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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Employers' Liability Act ("FELA") (45 U.S.C. § 51, *et seq.*), a discovery rule governs when a cause of action accrues for disease or injury sustained due to the cumulative effects of occupational exposure to a dangerous condition or substance over a period of time. The cause of action does not accrue for purposes of the FELA three year statute of limitations (45 U.S.C. § 56) until the plaintiff knows or, in the exercise of reasonable diligence, should know the critical facts of both (1) his injury and (2) its governing cause. The Petition presents the question, when the first of these two elements of accrual is in issue, of whether the time when the plaintiff knows or should know he has sustained an "injury" is a factual question that turns on when a reasonable person under the same circumstances would have known he had sustained a cumulative injury (as opposed to temporary pain or symptoms related to the heavy physical nature of his work) or, in the exercise of reasonable diligence, would have investigated by seeking medical examination and treatment? Or does the cause of action instead accrue as a matter of law when the plaintiff experiences any symptom, even a transient and minor one?

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FLORIDA CONSTITUTION

Art. V, § 3(b)(3), Fla. Const. 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, James A. Metz, Sr. ("Petitioner" or "Metz"), respectfully prays that a writ of certiorari be issued to the District Court of Appeal for the First District of Florida to review the judgment of the District Court of Appeal filed October 29, 2007, affirming a judgment of the Circuit Court for Escambia County, Florida.

OPINIONS BELOW

The judgment of the District Court of Appeal for the First District of Florida was filed on October 29, 2007, and appears as Appendix A (App. 1). The judgment of the Court of Appeal was a "*per curiam* affirmed" ("PCA") decision, meaning there was no written opinion or citation of authority. It is unpublished. The order of the Court of Appeal denying Petitioner's Motion for Rehearing and/or Clarification and for Written Opinion was filed on December 11, 2007 and appears as Appendix D (App. 8). The judgment of the Circuit Court for the First Judicial Circuit In and For Escambia County, Florida, dated November 17, 2006, entitled Order Granting Defendant's Motion for Final Summary Judgment appears as Appendix B (App. 2). The order of the Circuit Court denying Plaintiff's Motion to Alter or Amend Order Granting Defendant's Motion for Final Summary Judgment was entered on January 16, 2007 and appears as Appendix C (App. 5).

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a). The *per curiam* order of the District Court of Appeal affirming the judgment of the trial court was filed on October 29, 2007. Metz filed a timely Motion for Rehearing and/or Clarification and For Written Opinion on November 13, 2007. The order of the Court of Appeal denying Metz's Motion for Rehearing and/or Clarification and for Written Opinion was filed on December 11, 2007. This Petition for Writ of Certiorari is timely filed within ninety (90) days of December 11, 2007.

Under Art. V, § 3(b)(3), Fla. Const.,[1] the Florida Supreme Court does not "have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court." *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n.3

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[1] Art. V, § 3(b)(3) allows discretionary review by the Florida Supreme Court of "any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law" (emphasis supplied).

(Fla. 1988). The "*per curiam* affirmed" ("PCA") decision of the District Court of Appeal in this case is such a decision rendered without opinion or citation. In *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 139 n.4 (1987), this Court also recognized that "[u]nder Florida law, a *per curiam* affirmance issued without opinion cannot be appealed to the State Supreme Court." Review by writ of certiorari may therefore be sought directly in this Court pursuant to 28 U.S.C. § 1257(a).

The question presented by this Petition is whether the Florida courts below applied a test to determine when Metz's cause of action accrued under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 and 45 U.S.C. § 56, that is contrary to federal statutory law. Petitioner's claim is under a statute of the United States.

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or

Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . .

45 U.S.C. § 56

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

This is an action filed by Petitioner Metz under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"). The Complaint was filed on April 5, 2005 (Vol.I: 1-3),[2] and alleged in substance that during his employment by CSXT at various locations over a period of years, Metz performed heavy and repetitive work in awkward, strenuous and unusual positions that caused permanent, cumulative and disabling injury to his right shoulder, right arm and upper extremities (Vol.I: 1-3). The Complaint alleged Metz's injuries were caused in whole or in part by the negligence of CSXT. Metz also filed a Motion for Leave to File a First Amended Complaint on August 18, 2006 (Vol.III: 275-279). The First Amended

[2] References to the Record on Appeal will be shown by volume and page number as follows: (V.__: ___). Plaintiff's deposition was taken on two different days and is in two corresponding volumes and set forth in full in Vol. I: 26-124 and Vol. II: 125-274 of the Record. References to the deposition are to both the volume and page number of the deposition transcript, and the volume and page number as shown in the Record. Reference to p. 6 of Volume I of the deposition, which is also p. 130 of Volume II of the Record, is shown as: (Depo.I: 6; Vol.II: 130). Transcript references to the hearing on the Motion for Summary Judgment will be shown as: (Tr. __).

Complaint was intended to conform with Metz's deposition, in which he testified to injuries to his left shoulder, neck and back, as well as his right shoulder, right arm and upper extremities (Vol.III: 275, 280).

CSXT filed a Motion for Summary Judgment arguing Metz failed to file suit prior to the expiration of the three (3) year FELA statute of limitations. 45 U.S.C. § 56. CSXT's Motion was based on Metz's deposition. CSXT pointed to Metz's testimony that he had experienced some problems with his shoulders and neck at some time during January 2002. CSXT argued Metz's cause of action accrued no later than the end of January 30, 2002 and that Metz's Complaint, filed on April 5, 2005, was therefore untimely. (Vol.I: 8-10). The question was whether Metz's claim accrued prior to April 5, 2002.

CSXT argued the accrual date for this type of cumulative injury claim was governed by the "discovery" test set forth in *United States v. Kubrick*, 444 U.S. 111 (1979), that the cause of action accrues when the plaintiff knew, or in the exercise of reasonable diligence, should have known of both his injury and its operative cause. *See Kubrick*, 444 U.S. at 120-122, especially note 7 and accompanying text. CSXT argued the discovery test imposes an "affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s)." (Vol.I: 18). CSXT argued this duty to investigate is triggered, and the claim accrues for limitations purposes, at the "first onset of symptoms, even those minor in nature," citing, among other authorities, *Fries v.*

Chicago Northwestern Transportation Co., 909 F.2d 1092 (7th Cir. 1990). (Vol.I: 14-15, 18-22).

As part of his response to the motion for summary judgment, Metz submitted excerpts from his medical records.[3] The first notation in Metz's medical records of any complaints concerning his shoulders, neck or back was when he visited Dr. Pace on May 6, 2002[4] and complained of pain in his right shoulder (Pl. Ex. 5; Vol.III: 334). Metz had never been diagnosed as having any problems or disorders with his arms, shoulders, or neck prior to January 2002 (Depo.I: 146; Vol.II: 270). Dr. Pace had been Metz's family physician for 21 years (Depo.I: 69, 146; Vol.II: 193, 270), and was the first doctor Metz saw concerning his shoulders, neck and back (Depo.II: 11-12; Vol.I: 36-37). Dr. Pace's diagnosis on May 6, 2002 was right shoulder tendonitis (Pl. Ex. 5; Vol.III: 334).

Metz had only just recently had a prior visit with Dr. Pace on March 1, 2002, for a routine physical, during which he did not have any symptoms, complaints or positive examination findings concerning either of his shoulders, his neck or his arms (Pl. Ex. 2; Vol.III: 328). The records of that visit do not indicate any positive examination findings by Dr. Pace or

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[3] Plaintiff also submitted his own affidavit. The trial court, however, struck the affidavit. Accordingly, Plaintiff does not rely on the affidavit in this Statement of the Case.

[4] This visit to Dr. Pace on May 6, 2002 was thus less than three (3) years prior to the filing of the Complaint on April 5, 2005.

complaints by Metz concerning either of his shoulders, his neck or his arms (Pl. Ex. 2; Vol.III: 328). The records include notations that show Dr. Pace actually examined Metz's neck and extremities, and noted his objective findings with respect to the neck as follows: "NECK: NO MASSES, LYMPHADENOPATHY, THYROMEGALY, BRUITS, OR TENDERNESS. CAROTID PULSES ARE FULL AND STRONG." With respect to the extremities, the findings were: "EXTREMITIES: NORMAL RANGE OF MOTION AND NO TENDERNESS." (Vol.III: 328). There was thus a specific finding of no tenderness in both the neck and extremities. This visit was for a routine physical (Vol.III: 330) and the records (Vol.III: 328) show that Metz was being followed by Dr. Pace for other conditions and reported the occurrence of black tarry stools during the review of systems as part of that routine exam.

Dr. Pace referred Metz to Dr. Orth for a consultation (Pl. Ex. 3; Vol.III: 330-332) because of his tarry stools and a history of cancer in Metz's family (Vol.III: 330). Metz saw Dr. Orth on March 19, 2002 (Vol.III: 330). Dr. Orth reviewed Metz's history, past medical history, and social history. Nothing was noted concerning his shoulders, neck or arms (Pl. Ex. 3; Vol.III: 330). Dr. Orth's records noted that he conducted a physical examination and specifically addressed the areas of General, Neurologic, Neck and Extremities under the heading of "Physical Examination." Dr. Orth recorded his physical examination, which included Metz's neck and extremities, as well as a

neurologic exam. No positive findings were made on examination concerning his neck, back or shoulders and the notes concerning the neck made a specific finding that the neck was "supple" and without "tenderness." (Vol.III: 331).

As noted above, Metz thereafter saw Dr. Pace on May 6, 2002 (Pl. Ex. 5; Vol.III: 334). It was during this visit that Metz first complained of pain in his right shoulder, and this was the first time Dr. Pace made any positive findings concerning the right shoulder on examination. Metz was noted to have pain with forward flexion and abduction of the right shoulder with some tenderness on the top of the right shoulder. Dr. Pace's diagnosis was tendonitis. Metz was given a trigger point injection and advised that if the right shoulder had not improved in two weeks he was to call and schedule an orthopedic consult (Pl. Ex. 5; Vol.III: 334). There were still no complaints or examination findings at all as to the left shoulder, neck or back.

Metz saw Dr. Cameron, an orthopedic surgeon, on July 3, 2002 (Pl. Ex. 6; Vol.III: 336). His right arm could be elevated only 150 degrees compared to 180 degrees on the left, and internal and external rotation of the right arm was also limited. A right shoulder arthrogram was ordered. Dr. Cameron's diagnosis after the arthrogram was shoulder impingement syndrome. Metz was scheduled for diagnostic arthroscopic surgery (Pl. Ex. 6; Vol.III: 336).

Dr. Cameron performed arthroscopic surgery on September 24, 2002 (Pl. Ex. 6; Vol.III: 337). The operative diagnosis was anterior impingement syndrome of the right shoulder and partial detachment of the posterior superior labrum. The procedures performed were diagnostic arthroscopy and arthroscopic acromioplasty with resection of coracoacromial ligament right shoulder (Pl. Ex. 6; Vol.III: 337). Metz was able to continue to work at CSXT right up until his arthroscopic surgery (Depo.I: 134; Vol.II: 258).[5]

These medical records thus showed that actual physical examination of Metz on March 1 and March 19, 2002 revealed no problems with Metz's shoulder, arms, back or neck, and that Metz made no complaints about these parts of his body. The first positive examination findings concerning Metz's right shoulder were made on May 6, 2002. There were no complaints or findings, even at that time, concerning his neck, arms or left shoulder.

Metz's deposition, when considered in the light most favorable to Metz and drawing all possible inferences in favor of Metz,[6] and when taken in light of the medical records, showed the following:

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[5] Metz's subsequent course of diagnosis, treatment and disability are not set forth here because they do not relate directly to the limitations issue.

[6] Under Florida procedural law, the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985); *Willis v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.

(Continued on following page)

Metz testified he is not good with dates (Depo.I: 53; Vol.II: 177). This was also reflected in his response when he was first asked when he had first noticed symptoms in his shoulders and neck:

> Q. When did you first notice symptoms of a problem with your shoulders and neck area?
>
> A. I *guess* around January of 2002. Something like that. Around that area.

(Depo.I: 120; Vol.II: 244) (emphasis supplied). Throughout the remainder of the deposition, this "guess" then became the date that was used as the explicitly assumed factual predicate of the rest of defense counsel's questions.

Metz was next asked whether he went to see a doctor. His answer makes it clear he thought whatever symptoms he felt were minor and temporary in nature.

> Q. When you first began experiencing those symptoms, did you go see a doctor?
>
> A. No. Because I thought it was just like a, you know, little pull or something, you know, but it kept progressing.

1977). If the "record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." *Henderson v. CSX Transportation, Inc.*, 617 So.2d 770, 773 (Fla. 1st DCA 1993).

> Q. Had you had little pulls before over your career working?
>
> A. Oh, yes. You know, I don't know what you call it. Not a doctor, so I don't know what you would call it. But, anyway, this (indicating) just kept getting worse and worse and worse. I figured, well, it will ease off. It will ease off. But it didn't. I was eating BC's and BC's.
>
> Q. When you first started feeling the symptoms in your shoulders and neck in January of 2002, did you believe that those symptoms were caused by your work that you had done and were doing at the railroad?
>
> A. Yes. Because every time I'd do it, it'd hurt. I didn't do it, it didn't hurt, you know.
>
> Q. And I guess I understood you to say that you waited a while before seeing a doctor because you just thought that the symptoms would resolve themselves in time?
>
> A. I guess you can say that, yes.

(Depo.I: 120-121; Vol.II: 244-245). This passage shows Metz believed his symptoms to be temporary. He had experienced similar symptoms previously in his railroad career, what Metz referred to as "little pulls," which were temporary in nature and resolved themselves. Metz regarded these symptoms of pain as being like these "little pulls" and therefore reasonably expected them to also be temporary in nature, as they obviously had been in the past. Such pain as he experienced with these "little pulls" was not constant

– it was intermittent. He didn't hurt when he was not performing work at the railroad. The hurt went away then. Metz was not asked any questions about and did not testify as to *when* the symptoms of pain became worse.

The deposition revealed even more clearly the difficulty Metz experienced in attempting to accurately recall the timing of events concerning his condition in 2002 when he was asked about which medical professionals he first saw and when concerning his shoulder, neck and back. He erroneously testified he first saw Dr. Cameron rather than Dr. Pace, and made errors as to the time frames involved – errors defense counsel attempted to prompt him to correct. In attempting to respond to these questions Metz again stated his inability to furnish dates and time frames with certainty. (Depo.I: 121-122; Vol.II: 245-246).

Metz was able to recall two incidents when he felt some pain – one involving closing a rail car door and one involving a hand brake – but did not claim that any one event caused his cumulative injuries (Depo.I: 122-123; Vol.II: 246-247). At some point in time – and he was not even asked by counsel for CSXT to specify or estimate the date or time when this occurred – he remembered his shoulder burning. After that, he said it was just weak and hurt when he reached up to pull something down or to pry on a brake shoe bar (Depo.I: 123; Vol.II: 247).

At some point – and again counsel for CSXT did not ask Metz to say when – he told one of his supervisors about experiencing pain when pulling on a car door or hand brake (Depo.I: 126-127; Vol.II: 250-251). He was then asked the following:

> Q. How much later was it after the initial conversation you think you had that you told him you needed to go to the doctor?
>
> A. I guess it progressively got worse. My guess over the next four months or so, you know, and then it got to where it just – when I picked my arm up to do something, it hurt, so.
>
> Q. It's kind of a difficult question to ask and I am trying to understand your answer.
>
> A. Hard to answer.

(Depo.I: 127; Vol.II: 251). Once more, Metz explicitly stated his answer as to timing was a "guess." Metz was not asked when it got to where it hurt when he picked up his arm to do something but the above answer clearly suggests that it was at the end of this four month period of time. Nor did counsel for CSXT ever ask whether any of Metz's symptoms were constant or continuous throughout this period of time. As noted above, his deposition indicates they were not constant or continuous. Based on this testimony, when considered in connection with Metz's medical records, it could be reasonably concluded that nothing had become "progressively" worse as of when he saw Dr. Orth on March 19, 2002. Metz saw Dr. Pace and

first reported pain in his right shoulder on May 6, 2002, well within three years of the filing of his complaint on April 5, 2005.

A jury could thus reasonably conclude that any pain Metz experienced in his shoulders prior to May 2002 was similar to the temporary "little pulls" he had previously experienced from time to time. Metz reasonably expected these "little pulls" to be temporary in nature, as they had been before, and it is clear such pain as he experienced was intermittent and went away when he was not engaged in work activities. No "progression" to anything constant or more severe had occurred as of when Metz saw Dr. Pace and Dr. Orth in March 2002. A jury could reasonably conclude from this evidence that any such "progression" did not occur until May 2002 when Metz went to Dr. Pace to report pain in his right shoulder. And based upon that, a jury could also reasonably conclude that Metz's cause of action did not accrue until after April 5, 2002. It was not shown that Metz knew or, in the exercise of reasonable diligence, should have known prior to April 5, 2002 that he had sustained a cumulative injury – rather than intermittent and temporary pain, similar to the "little pulls" he had experienced before and that he reasonably believed would be temporary – or that Metz, in the exercise of reasonable diligence, should have sought medical attention for his shoulder prior to the time he in fact saw Dr. Pace about his right shoulder on May 6, 2002.

The Motion for Summary Judgment was argued on October 25, 2006 (Tr.1-30).[7] On November 17, 2006, the trial court entered a written Order Granting Defendant's Motion for Summary Judgment (Vol.III: 342-343).

The trial court denied Metz's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment (Vol.III; 345-346; 380-381).

On appeal the District Court of Appeal entered a *per curiam* order affirming the summary in favor of CSXT without opinion or citation of authority. Appendix A.

REASONS FOR GRANTING THE WRIT

When an FELA action is filed in state court, federal substantive law is controlling. *E.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985); *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 492-493 (1980). Federal substantive law governs when a cause of action accrues under the FELA three-year statute of limitations set forth in 45 U.S.C. § 56. *Urie v. Thompson*, 337 U.S. 163, 169-171 (1949); 45 U.S.C. § 56 ("No action shall be maintained under this chapter unless commenced within three years

[7] The Motion to file the First Amended Complaint and CSXT's Motion for Summary Judgment were both heard on October 25, 2006. CSXT's Motion addressed the substance of the allegations in the First Amended Complaint (Tr. 28-30; Vol.I: 8-9).

from the day the cause of action accrued"). Under the FELA, the right to a jury trial in close or doubtful cases is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943). "To deprive these workers of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.*

In *Urie*, this Court adopted a discovery-type standard to determine when "the cause of action accrued" within the meaning of 45 U.S.C. § 56 in an action for cumulative disease or injury caused by occupational exposure to a harmful substance or condition over a period of time, holding that the employee is not deemed to be "injured" for purposes of the FELA, and the cause of action therefore does not accrue, until "the *accumulated* effects of the deleterious substance manifest themselves." *Urie*, 337 U.S. at 170 (emphasis supplied). This Court rejected narrower and harsher tests of accrual that would "only serve to thwart the congressional purpose" and the "humane legislative plan" embodied in the FELA, and would have rendered the plaintiff's FELA claim "only a delusive remedy." *Urie*, 337 U.S. at 169-170.

The result reached by the Florida courts in this case effectively adopted CSXT's argument that Metz's cause of action accrued as a matter of law at the "first onset on symptoms, even those minor in nature," in January 2002 even though a jury could have determined that Metz reasonably regarded any problem or pain he experienced in his shoulders, neck or back

prior to April 5, 2002 as merely a temporary result of performing heavy manual labor that would go away, as similar "little pulls" he had experienced before during his long career with CSXT had gone away, and that it therefore cannot be said that a reasonable person in Metz's circumstances would have sought medical attention before April 5, 2002, three years prior to the filing of his complaint on April 5, 2005. The result reached by the Florida courts in this case is therefore contrary to this Court's decision in *Urie*, to the "congressional purpose" and "humane legislative plan of the FELA" relied upon by this Court in *Urie*, and to the better reasoned decisions of the federal and state courts that have considered the specific issue of when a plaintiff asserting injury due to repetitive or cumulative occupational exposure to a harmful condition or substance is deemed to be "injured" and his cause of action accrues under 45 U.S.C. § 56. CSXT's argument relied heavily on statements made in the Seventh Circuit's opinion in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990), a case which is factually and legally very different from the instant case. The decision of the Florida courts is not properly supported by either the actual holding in *Fries*, or any statement made in the course of the *Fries* opinion. However, some of the language in *Fries*, if taken out of context, may possibly be misread and improperly applied to lead to an erroneous result, such as that reached by the Florida courts in this case.

This Court should grant certiorari to clarify this issue, and to make clear that the issue of when an FELA plaintiff making a cumulative injury claim knew, or in the exercise of reasonable diligence should have known, that he had suffered an "injury" is a question of fact that turns on when a reasonable person in circumstances similar to plaintiff would have first sought medical attention and to disapprove the view that the cause of action automatically accrues as a matter of law at the time he first experiences any symptom, however small.

The General Test of When a Cause of Action Accrues Under 45 U.S.C. § 56

In FELA cases involving traumatic injury, the cause of action accrues when the injury occurs, because the effects of the injury are immediately apparent, even if the full extent of the resulting disability is not known at the time of the injury. *E.g.*, *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.3d 605, 609 (Mo.App. 2001). A different rule applies in occupational disease cases when there is an "ongoing, continuous exposure to an occupational condition which accumulates and causes disability later, perhaps many years later, after the first exposure." *Id.* When the specific date of a cumulative injury cannot be determined because the injury is the result of the plaintiff's repetitive or continual exposure to a harmful condition over a period of time, "the day the cause of action accrued" under 45 U.S.C. § 56 is determined by a "discovery" rule. The applicable rule was first

stated by this Court in *Urie v. Thompson*, 337 U.S. 163, 170 (1949). In *Urie*, plaintiff was exposed to airborne silica dust on the railroad for more than 30 years, until he became too ill to work. This Court rejected the claim the action was barred because plaintiff must have contracted silicosis more than three years before he filed suit, and held:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the *accumulated* effects of the deleterious substance manifest themselves * * * ."

Urie v. Thompson, 337 U.S. 163, 170 (1949) (emphasis supplied; quotation marks in Court's opinion; citation omitted).

In *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979), this Court adopted the *Urie* approach in determining when a claim "accrues" under the Federal Tort Claims Act, 28 U.S.C. § 2401(b). *Kubrick* implicitly adopted the standard that a plaintiff must have known or, in the exercise of reasonable diligence, should have known of both his injury and its cause in order for the cause of action to accrue. *Kubrick*, 444 U.S. at 120-122, especially note 7 and accompanying text. The specific holding of *Kubrick* was a narrow one: if the plaintiff knows of both his injury and its governing cause, it is not necessary for the plaintiff to also learn that he has a legal right to sue for damages for his injury in order for the cause of action to accrue. This issue was important in *Kubrick* because on the facts knowledge of the cause of the injury – the use of a particular irrigating solution during a medical procedure – was not the equivalent of knowledge that use of that solution also constituted actionable negligence. *Kubrick* reasoned that once the plaintiff knows or should know of both his injury and its cause, the accrual of the cause of action should not be further delayed until he knows that he has a legal claim for damages, because he can protect himself by obtaining medical and legal advice to determine whether he has a cause of action.

The rule now generally accepted by both state and federal courts applying substantive federal law under the FELA, based upon *Urie* and *Kubrick* read together, is that the cause of action accrues when a reasonable person knew or, in the exercise of reasonable diligence,

should have known of both the essential facts of his injury and its governing cause. This is the statement of the general test as set forth in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990), as well as in many other federal and state court FELA decisions. *E.g., Green v. CSX Transportation, Inc.,* 414 F.3d 758, 763 (7th Cir. 2005); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993); *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106, 109 (Colo.App. 2002).

Under this "discovery" test, for a cause of action to accrue, both of the above elements must be satisfied. The employee must have known or, in the exercise of reasonable diligence, should have known of both (1) the injury that is the basis of his action, and (2) the cause of the injury. The issue in this case relates only to the first of these two elements: when the plaintiff knows or, in the exercise of reasonable diligence, should know he has sustained an "injury."

The Issue of When Plaintiff Knows or, In the Exercise of Reasonable Diligence, Should Know He Has Sustained A Cognizable Injury Under the "Discovery" Test: Permanent Compensable Condition v. Symptoms of Pain or Discomfort The Employee Reasonably Believes To Be Temporary In Nature

In the great majority of the reported FELA appellate decisions applying this discovery test the point in dispute is not when plaintiff knew or should

have known of the essential *fact* of his injury. The point in dispute is instead when the plaintiff knew of should have known of the governing *cause* of his injury and that it was related to his employment with the railroad.

In this case, by contrast, the issue is whether a reasonable person in Plaintiff's position knew or, with reasonable diligence, should have known before April 5, 2002 that he had sustained the cumulative *injury* to his shoulders, neck and back that is the subject of this action. For purposes of this issue there is a distinction between permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature. An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. A number of decisions illustrate the proper application of this principle.

In *Ray v. Illinois Central Railroad Co.*, 864 F.Supp. 569 (E.D. La. 1994), the basis of the claim was Morton's neuroma, a condition in which the nerves in the balls of the feet are exposed, due to walking on slag as part of plaintiff's duties for railroad. Suit was filed in February 1994. Plaintiff had complained to supervisors about discomfort from walking on slag in the 1970's and 1980's. In the 1980's, he knew that walking on slag was causing pain in his feet. His occasional pain became fairly constant prior to 1991, more than three years prior to the filing of his action, but plaintiff did not realize the

pain was severe enough to seek medical treatment until 1992, when a doctor advised him that he had Morton's neuroma. The railroad's motion for summary judgment based on limitations was denied because there was a factual issue as to when he knew or should have known he had suffered an injury. The court stated that:

> While there does appear to be no dispute that plaintiff knew his feet hurt because he walked upon slag, there is considerable dispute when plaintiff knew he suffered an injury. While plaintiff knew his feet hurt, there is a factual issue whether the pain in his feet should have caused him to seek medical attention sooner such that he could have discovered he had Morton's neuroma. Defendant may succeed in convincing the factfinder that his complaints were such that a reasonable man would have sought medical attention sooner, but this is a question of fact in dispute.

Ray, 864 F.Supp. at 570.

In *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.3d 605, 609 (Mo.App. 2001), the employee filed his FELA action in December 1996, alleging that he had suffered injuries to his hands and wrists from years of exposure to vibrating power tools used in his job as a carman. In 1988 or 1989, he began to experience pain in his right hand and wrist that he associated with the use of hammers, sledge hammers and staple guns on the job. When he saw a doctor in 1994, he told the doctor that when he experienced this pain in the past, he took aspirin and

the pain resolved. The pain was intermittent and transitory, and would not recur for several months. There was no evidence that this pain incapacitated him. There was no evidence plaintiff would not have considered his symptoms as merely temporary inflammation. In 1994, he began to have increasing pain and symptoms that were not relieved by aspirin, and which he stated were different from the intermittent symptoms he had experienced prior to that time. He first saw a doctor in 1994, and was eventually diagnosed with a permanent injury to his hands and bilateral ulnar nerve injury. The court held that "there is a difference between having an injury of the type for which a claim for compensation can be filed, and an intermittent pain which is presumed to be a temporary condition, and which is resolved quickly by the taking of an analgesic such as aspirin." *Sabalka*, 54 S.W.3d at 610. In applying this Court's holding in *Urie* the court held:

> The [Supreme] court did not rule that the employee is considered injured whenever the employee is aware of any symptom, even a temporary symptom. Rather, it is a matter of when the employee should be aware that there is an injury of a compensable nature.

Sabalka, 54 S.W.3d at 611 (bracketed material supplied).

In holding the jury should not have been instructed on the statute of limitations because there was no evidence to support the instruction, *Sabalka* reasoned that:

> Indeed, we believe it would have seemed foolish to him to file a claim for compensation under the FELA prior to December 26, 1993. At that time, he had no lingering symptoms and no substantiation of any injury. He had not suffered symptoms severe enough to cause him to consult a physician about his right hand or wrist. Sabalka had absolutely no symptoms in his left hand. The intermittent symptoms did not create awareness that he was suffering from a bodily condition causing incapacity.

Sabalka, 54 S.W.3d at 612. *See also Coots v. Southern Pacific Company*, 49 Cal.2d 805, 814, 322 P.2d 460, 466 (en banc 1958) (FELA claim based on occupational dermatitis) (concurring opinion of Justice Spence) ("[I]t does not comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer, when an apparently minor and temporary manifestation of skin trouble occurs."); *Fonseca v. Consolidated Rail Corporation*, 246 F.3d 585, 592 (6th Cir. 2001) (if plaintiff had filed suit at an earlier time, "without any medical evidence beyond his transient aches and pains after a long days work, the railroad would likely have claimed that the action lacked any evidentiary support").

In *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App. 1994), the employee alleged he had developed occupational asthma as a result of his work environment over a period of years. While at work, he was exposed to asbestos, strong odors from diesel engines, cleaning agents, chemicals, spray paints,

dust particles and fumes from welding around motor grease and fuel oils. He experienced chest tightening, burning watery eyes, runny nose, throat tightening and difficulty in breathing while at work, but did not suffer these symptoms after he left the workplace. He believed his exposure to these substances triggered his allergies or that the symptoms he experienced were simply a normal temporary reaction to exposure to these substances similar to those anyone would experience under similar circumstances. He did not believe these symptoms were evidence of a slowly manifesting permanent condition. His allergist had informed him more than ten years before he filed his action that his working conditions were aggravating his "symptoms" and had recommended he wear a filtering apparatus or respirator at work. Another doctor had informed him five years before he filed his action that he believed there might be a connection between the employee's work and his respiratory problems. The court held this was insufficient to hold as a matter of law that the employee was aware of his condition and its cause beyond the statute of limitations time frame. The court explicitly acknowledged the statement in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) that to allow an employee to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent" of the statute of limitations. The court nevertheless held that:

> [I]t is not enough to suspect a problem and a causal connection to start the statute of limitations ticking; one must either know of the problem and the probable connection or actively ignore a manifest problem which would be apparent to a reasonable person. . . . It is knowledge, and not speculation, which triggers the statute of limitations.

Reasons, 886 S.W.2d at 108-109. The court went on to state that:

> We refuse to abrogate a person's cause of action when it is unclear whether the employee was truly aware of the permanency of the problem. While there is no question employee knew his occupational conditions irritated him when he was at work, in order to find the statute of limitations has expired, we must find the employee was aware the he had sustained permanent damages that would not go away when he left his job site.

Reasons, 886 S.W.2d at 109.

In *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App. 2002), plaintiff claimed cumulative injury to his upper back and neck. Plaintiff had three chiropractic visits concerning neck symptoms more than three years prior to filing suit. He made statements indicating he knew more than three years prior to filing suit that the locomotive seats he used on the job were causing him discomfort and exacerbating his neck and back pain. The court distinguished intermittent pain that is

presumed to be temporary and quickly resolved from permanent cumulative injury. The court held that it was not established as a matter of law that the plaintiff knew he had a permanent cumulative injury and that a reasonable jury could conclude that prior to the limitations period plaintiff did not have reason to know that he had a work-induced cumulative injury to his neck and spine.

In *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005), one of plaintiff's claims was for cumulative injury to her right shoulder. She had experienced pain in her right shoulder on several occasions more than three years prior to filing her action was aware that the pain she experienced was related to her work on the railroad. She sought medical treatment for right shoulder pain at least once more than three years prior to filing her action. The Seventh Circuit nevertheless reversed a summary judgment entered in favor of CSXT. The court concluded that none of the reports related to symptoms of right shoulder pain had been shown to be serious enough to put plaintiff on notice "that it was time to sue her employer or lose her right to do so." *Green*, 414 F.3d at 764. The court instead recognized that some manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 424 F.3d at 764 (citations omitted). *Green* held plaintiff had the right for a jury to decide whether her shoulder issues outside the limitations period put her on notice that she had

suffered a cognizable work related injury and "whether a reasonable person in her circumstances would have realized she had suffered more than a *de minimus* cumulative injury to her right shoulder and that the injury was work related." *Green*, 424 F.3d at 764-765. *See also Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D.New Mex. 2005); *CSX Transportation, Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947 (1994); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993).

These decisions properly recognize that when, as here, a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have known that he had sustained an "injury" turns on when a reasonable person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. This test adheres to the principles established by this Court in *Urie* and serves the "congressional purpose" and "humane legislative plan of the FELA". *Urie*, 337 U.S. at 169-170. These decisions also recognize this is a factual determination to be made by the jury when different inferences and conclusions may be drawn from the evidence.

The result reached by the Florida courts in this case effectively rejects the foregoing approach and instead adopts the position – argued by CSXT in the courts below – that the cause of action accrues as a

matter of law at the "first onset of symptoms, even those minor in nature" (Vol.I: 18-21), and is based on mistaken application of the duty to investigate that was set forth by this Court in *Kubrick*.

Kubrick simply held that the cause of action accrues when the plaintiff knows or should know that he had been injured and what caused his injury; he need not also know that there was actionable negligence entitling him to recover damages. *Kubrick* reasoned that once the plaintiff knows of his injury and its cause, he can protect himself by seeking advice as to whether he has a cause of action. *Kubrick* has since been read to hold that the discovery standard, to the extent that it looks at when the plaintiff should have known of both his injury and its governing cause, includes a duty to investigate on the part of the plaintiff. This most frequently is an issue when the plaintiff argues that his cause of action did not accrue outside the limitations period because he did not know that the *cause* of his injury was work related. *Kubrick* has been held to require that when a railroad employee is aware that he has sustained an injury, he then has a duty to act reasonably to investigate the cause of his injury and whether it is work related. He may not indefinitely delay the accrual of the cause of action on the ground that he did not know the cause was work-related by failing to seek medical advice to determine whether the cause was work-related.

This was the holding in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th

Cir. 1990). In *Fries*, suit was filed in November 1987. Both plaintiff and his wife acknowledged they suspected that plaintiff had a hearing loss as far back as 1980 and 1981. Thus, there was no real dispute as to whether plaintiff knew or should have known he had sustained an injury. Both plaintiff and his wife also acknowledged they could not attribute his hearing loss to any cause other than his work. Between 1980 and May 1985, a period of more than four years, he did not seek any medical examination or treatment for his suspected hearing loss. Plaintiff argued his cause of action did not accrue until 1985 when he obtained actual knowledge that his hearing loss was caused by his work environment from a back-to-work physical, when he was diagnosed with a hearing loss caused by his work. The court in *Fries* applied the rule that "a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Fries*, 909 F.2d at 1095. "Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause." *Id.*

The court stated:

> Moreover, the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a potential cause. . . . That this rule imposes on injured plaintiffs an affirmative duty to investigate

> the potential cause of his injury has not been lost on the courts.

Fries, 909 F.2d at 1095 (citation omitted).

The court acknowledged that *Urie* intended to "ameliorate the harshness of statutes of limitations when the injury is hard to detect at its inception." *Fries*, 909 F.2d at 1095. "What the *Urie* Court did not do was provide an escape for plaintiffs who are aware the some type of injury exists yet who choose to ignore it by failing to seek diagnosis and investigate the cause." *Id.* Thus the court approved the statement of the district court that "[t]o allow a plaintiff to unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent of 45 U.S.C. § 56." *Id.* at 1096. The reference to whether plaintiff has "negligently" failed to investigate explicitly indicates that the plaintiff's conduct in this regard is to be measured by what a reasonable person would do under the same or similar circumstances. *Urie v. Thompson*, 337 U.S. 163, 174 (1949) (negligence under the FELA is the "failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done").

The entire context of *Fries* and cases like it assumes a plaintiff who is aware that he has sustained an injury. That part of the *Kubrick* test was not in issue in *Fries*. Plaintiff had been aware of an

injury in the form of hearing loss for many years. The issue was instead when he knew or should have known of the *cause* of his hearing loss and that the cause was work-related. It was in this context that the court held the plaintiff was required to investigate the cause of his injury. And it was in this context, in which plaintiff's awareness of the fact of his injury was not really in dispute, that *Fries* stated that "upon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause." *Fries*, 909 F.2d at 1096. Similarly, the statements in Fries and other like cases that accrual of the cause of action is not delayed until there is a diagnosis by a doctor or until the condition reaches its maximum severity make sense when plaintiff's knowledge that he had sustained an injury is not really in issue. Taken out of this context and applied to a case where the real issue is in the first instance whether the plaintiff knew or should have known that he had sustained an *injury*, *Fries* may be improperly construed, as it was by CSXT in the courts below, to mean that the cause of action accrues as a matter of law at the "first onset on symptoms, even those minor in nature."

Moreover, applying *Fries* in this way ignores the fact that *Fries* itself defines the question in terms of whether the plaintiff has "*negligently*" failed to investigate – a factual question that turns on what a reasonable person in similar circumstances would have done. Petitioner does not dispute that the requirement of due diligence as set forth in *Kubrick* is

applicable to whether a plaintiff knows or should know that he has sustained an injury. But a plaintiff's diligence, including the point in time when he seeks medical treatment and advice, must be measured by what a reasonable person would have known and done in the same circumstances. Here the similarity between the temporary "little pulls" Metz experienced in the past to those he experienced in January 2002 – especially when considered in light of the medical records that actual examinations of Metz by physicians during March 2002 showed no evidence of any problems with his shoulders, neck or back and that the very first positive examination findings as to his right shoulder were not until May 6, 2002 – demonstrates that a jury could find Metz did not know and, in the exercise of reasonable diligence, did not have reason to know he had sustained an "injury" prior to April 5, 2002. As *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005) (a decision of the Seventh Circuit, as was *Fries*),[8] and the other cases cited above show, some symptoms or manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 414 F.3d at 764 (citations omitted). The issue of whether such symptoms put him on notice that he had suffered a cognizable work related injury, and

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[8] It is of interest on this point that Judge Bauer, the author of *Fries*, was also a member of the panel that later decided *Green*.

whether a reasonable person in his circumstances would have realized he "had suffered more than a *de minimus* cumulative injury . . . and that the injury was work related," *Green*, 414 F.3d at 764-765, should have been submitted to and decided by a jury rather than being concluded as a matter of law by the trial judge on summary judgment.

CONCLUSION

For these reasons Petitioner James A. Metz. Sr., respectfully prays this Honorable Court to issue its writ of certiorari to the District Court of Appeals for the First District of Florida, and to reverse the judgment of the Florida courts and remand this cause for trial.

Respectfully submitted,

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Counsel for Petitioner
James A. Metz, Sr.

JAMES A. METZ, SR.,

Appellant,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Appellee. /

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D07-0617

Opinion filed October 29, 2007.

An appeal from the Circuit Court for Escambia County. Jan Shackelford, Judge.

Kenneth R. Ridlehoover of Eddins, Ridlehoover, & Barnes, Pensacola; Andrew S. Williams and C.M. Friedman, St. Louis, MO; Stephen J. Moore, St. Louis, MO, for Appellant.

Dennis K. Larry and Jason W. Peterson of Clark, Partington, Hart, Larry, Bond & Stackhouse, Pensacola; Forrest Wilson of McDowell Knight Roedder & Sledge, L.L.C., Mobile, AL, for Appellee.

PER CURIAM.

AFFIRMED.

KAHN, PADOVANO, and HAWKES, JJ., CONCUR.

**IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA**

JAMES A. METZ, SR.,

Plaintiff,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Defendant. /

CASE NO. 05-CA-625
Division: F

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE is before the Court pursuant to notice upon Defendant CSX Transportation Inc.'s Motion for Final Summary Judgment contending that Plaintiff failed to file his claim within the applicable statute of limitations. In response to Defendant's motion, Plaintiff filed an affidavit with certain medical records attached as exhibits. Plaintiff also filed a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. Defendant filed a Motion to Strike Affidavit and Exhibits. In response to Defendant's motion to strike, Plaintiff filed Plaintiff's Response to Defendant's Motion to Strike and Motion to Supplement. Plaintiff's counsel, Andrew Williams, also filed an affidavit in support of Plaintiff's Motion to Supplement. Additionally, the Court has reviewed Volume I and Volume II of Plaintiff's deposition transcript that is on file in the Court file.

This Court, having considered the above referenced motions, memoranda, affidavits and deposition transcripts, and having heard oral argument of counsel, finds as follows:

1. Defendant's Motion to Strike Exhibits attached to Plaintiff's affidavit is denied. Plaintiff's Motion to Supplement is granted. The medical records attached as exhibits to Plaintiff's affidavit were reviewed by the Court in considering its ruling on Defendant's Motion for Final Summary Judgment.

2. The Defendant's Motion to Strike Plaintiff's Affidavit is granted. This Court finds that the sworn testimony contained in Plaintiff's affidavit is in direct conflict with his deposition testimony. Specifically, Plaintiff's affidavit conflicts with the deposition testimony contained on page 120 and 127 of Volume I of Plaintiff's deposition transcript.

3. Defendant's Motion for Final Summary Judgment is granted. This Court finds that final summary judgment shall be entered in favor of Defendant and Plaintiff shall take nothing by his Complaint.

4. The Court reserves jurisdiction to assess taxable costs against Plaintiff.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 17th day of November, 2006.

/S/ Jan Shackelford
Circuit Judge Jan Shackelford

Conformed copies to:
Jason Peterson, Esq.
Forrest C. Wilson, III, Esq.
Andrew Williams, Esq.
Kenneth R. Ridlehoover, Esq.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR.,

Plaintiff,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Defendant. /

CASE NO. 05-CA-625
Division: F

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO STRIKE SUPPLEMENTAL AFFIDAVITS

THIS CAUSE is before the Court pursuant to its review of Plaintiff's Motion to Alter or Amend Order Granting Defendant's Motion for Final Summary Judgment and its review of Defendant's Motion to Strike Supplemental Affidavits.

On November 21, 2006, this Court entered final summary judgment in favor of the Defendant finding that Plaintiff failed to file his claim within the applicable statute of limitations. On December 1, 2006, Plaintiff timely filed the subject Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment. In support of Plaintiff's motion to alter or amend, Plaintiff filed supplemental

affidavits of James A. Metz, Sr., Dr. James Pace, and Dr. Robert Cameron. The physicians' affidavits were presented for the first time after this Court rendered summary judgment in favor of the Defendant. In response to Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment, Defendant filed an opposition to Plaintiff's motion and filed a Motion to Strike Supplemental Affidavits. This Court, having reviewed Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment, having reviewed Plaintiff's supplement to his motion to alter or amend, having reviewed Defendant's written opposition to Plaintiff's motion, and having reviewed Defendant's Motion to Strike Supplemental Affidavits, finds as follows:

1. Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment is denied.

2. Defendant's Motion to Strike Supplemental Affidavits is granted.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 16th day of January, 2007.

/s/ Jan Shackelford
Circuit Judge Jan Shackelford

Conformed copies to:
Jason Peterson, Esq.
Forrest C. Wilson, III, Esq.
Andrew Williams, Esq.
Kenneth R. Ridlehoover, Esq.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

December 11, 2007

CASE NO.: 1D07-617
L.T. No.: 05-CA-625

James A. Metz, Sr.	v.	Csx Transportation, Inc., A Virginia Corporation
Appellant/Petitioner(s),		Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellants motion filed November 13, 2007, for rehearing and/or clarification and for written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order

Served:

Newton G. Mccoy
Kenneth R. Ridlehoover
Forrest Wilson
C. M. Friedman
Stephen J. Moore
Dennis K. Larry
Andrew S. Williams
Jason W. Peterson

jm

/s/ Jon S. Wheeler [SEAL]
JON S. WHEELER, CLERK